ABSTRACTS

Junior Lenders in the Commercial Mortgages

Noriyuki AOKI

What should be the legal contents of the security interests or mortgages in the commercial real estate which is feasible for the junior lenders? In Japanese tradition, their favorite has been the junior mortgage which has almost same contents as the first mortgage, expect the priority. It must be too big for the multiple lenders and lien holders relevant to the commercial real estate to distribute the equity efficiently. In this article, I will explore the American history of junior lenders' mortgages and security interests, to clarify the excessiveness of junior lenders' power in Japanese real estate mortgage transactions.

Historical Study on the Relationship between Labor Supply Contracts and Legal Regulations in Japan（1）

Makoto ISHIDA

This study conducts an historical and empirical examination of the process by which legal regulations on labor supply contracts developed in Japan from the 19th through the 21st centuries, while keeping in mind the character of business organizations and employment forms in each time segment of that period. Through this examination, I hope to arrive at a certain outlook on the future of the labor-law regulation imposed on labor supply contracts, which are, under the Civil Code, currently known by terms such as employment, subcontracting, and commissioning.

In this article, I has used the "analysis framework" (the model of the

“three stages of business organizations, and their member compositions and employment forms”）to analyze the historical development of legal regulations governing labor supply contracts in Japan during the first half of the 19th century, i.e., under the Tokugawa Shogunate.

In this article, I devised the first stage（19th century）in the three-stage model of my “analysis framework” based on my own analysis of the historical development process of British employment contract law, while consulting the research of Bendix and Littler.

The first question from the “historical viewpoint” was whether the first -stage model devised from Britain’s historical process applies to Japan’s historical process, and the investigation found that although there is a difference between the two countries in their rates of industrialization（especially in Type C business organizations）, the model devised from Britain’s historical process applies to Japan’s historical process for the most part.

This is because in Japan as well, owing to relations based on social station, the small technological base of industry, and other limitations in those days, there were diverse forms in the scope of business organizations, as well as in their member compositions and employment forms. That in turn influenced the nature of labor supply contracts between employers（proprietors）and workers, so that coexisting horizontally and vertically in a single business organization were direct employment and indirect employment, or those similar to “employment” and “subcontracting” in the senses used in the present civil code.

The “comparative viewpoint” with Britain reveals that, particularly among labor supply contracts, indentures and the regulations that govern them had Japan-like characteristics. First, surety bonds were regarded as necessary for concluding the indentures, and indentures without them did not grant the employer the right to bring suit. One can see that in an indenture, the labor supply contract and warranty contract were still

undifferentiated. Additionally, servants lacked not only the right to cancel an indenture, but even the right to bring suit. These conditions were not seen in the employment practices for and legal treatment of British domestic servants, whose circumstances were also still greatly affected by social station, and one could argue that this is a characteristic of regulations governing labor supply contracts in a Japan-like status society.

Second are the Japan-like characteristics of labor supply contract performance. As many studies have already found, the judicial system under the Shogunate was extremely weak. For example, apparently a considerable number of suits had been brought before the Edo municipal magistrates, but they lacked the ability to process these properly and quickly. Because of this, in early modern Japan it was more difficult than in Britain for public authorities to guarantee the enforcement of a contract by a third party, and one presumes that the performance of labor supply contracts was no different. Who, then, was responsible for contract performance? In the case of labor supply contracts, that role was fulfilled by the internal norms of merchant guilds and other intermediary groups. Here Japan-like characteristics are seen through the performance of labor supply contracts. This is a major difference with Britain, where under a "judicial state system" the Master and Servant Acts were invoked to impose punishments for worker violations of labor supply contracts, and justices of the peace, who had authority to enforce the law, vigorously compelled contract performance.

Goals of Corporate Governance and Methods for Achieving Them

Kenjiro EGASHIRA

The Tokyo Stock Exchange amended its Securities Listing Regulations

to require its listed companies to comply with the Corporate Governance Code（the Code）on June 1, 2015. The Code adopts for implementation the so-called "comply or explain" approach in the same way as the Combined Code which has been incorporated in the Listing Regulations of the London Stock Exchange. What is worthy of attention in the Code is two-fold. First, the Code establishes a definition for "Corporate Governance" as follows:

"In this Corporate Governance Code, "corporate governance" means a structure for transparent, fair, timely and decisive decision-making by companies, with due attention to the needs and perspective of shareholders and also customers, employees and local communities."

Corporate Governance customarily means a structure to make corporate managers who owe fiduciary duties to shareholders fulfill their responsibilities. This definition of the Code, however, seems to sideline the view of monitoring corporate managers and instead highlights encouraging their initiatives.

Second, the Code seeks "growth-oriented governance". The most famous part of the Code states as follows:

"The Code does not place excessive emphasis on avoiding and limiting risk or the prevention of corporate scandals. Rather, its primary purpose is to stimulate healthy corporate entrepreneurship, support sustainable corporate growth and increase corporate value over the mid-to long-term."

A commonly held view is that good corporate governance contributes effectively towards lowering the cost of capital by capturing the investors' confidence in the company（the OECD Principles of Corporate Governance 2004）. This means that the denominator, the cost of capital in the formula of the net present value of a firm, is lowered. On the other hand, "sustainable corporate growth" which is referred to by the Code means that the numerator of the above-mentioned formula is raised. Is engaging

in good corporate governance by following the Code truly useful for the growth of a corporation?

This article argues that the possibility of corporate growth depends mainly upon the abilities of the CEO. Unfortunately, good corporate governance (particularly, an independent board of directors) is not directly related to the appointment of excellent CEOs. From among all the methods mentioned in corporate governance context, the only method that might be useful for corporate growth is a "buyout" undertaken by a buyout fund. The number of such buyouts, however, has been small in Japan as compared with other developed countries, the concern regarding employment issues being one factor behind this.

Renseigner ou *se renseigner* ? —— l'aspect délictuel de la réticence dolosive en droit actuel français.

Kazuma YAMASHIRO

D'après l'opinion communément admise dans la doctrine française, le fait que la victime a négligé de se renseigner alors qu'il aurait dû le faire n'empêche pas l'annulation du contrat conclu sous l'influence du dol. Cela vaut aussi pour le cas de la réticence dolosive ? Pour répondre à cette question, la Cour de cassation a établi une règle selon laquelle « *la réticence dolosive rend toujours excusable l'erreur provoquée* » (Cass. 3e civ., 21 février 2001, Bull. civ. III, no 20).

Cet article a pour finalité de mesurer la portée de cette règle jurisprudentielle et d'estimer son opportunité. À cette fin, après une remarque introductive de l'état actuelle du droit japonais en cette matière (I), nous donnons d'abord un aperçu historique de la notion du dol dans la formation du contrat (II); ensuite, nous allons examiner la discussion doctrinale à

propos de la jurisprudence récente (III); enfin, nous réfléchirons ce que suggère la solution retenue dans le droit français à l'égard du droit japonais (IV). Cela nous amène à reconsidérer l'aspect délictuel de la réticence dolosive et son rapport avec la notion du devoir de se renseigner.

Die Prozessführungsbefugnis und die Rechtskraft des nicht rechtsfähigen Vereins im Prozess über das Grundstück, dessen Eigentum seinen Mitgliedern materiellrechtlich gemeinsam zusteht

Kaori NAKAMOTO

Nach japanischer Rechtsauffassung steht das Vermögen des nicht rechtsfähigen Vereins seinen Mitgliedern materiellrechtlich als Gesamteigentümern zu. Weiterhin ist ein nicht rechtsfähiger Verein nicht grundbuchfähig. Daher ist es streitig, ob ein nicht rechtsfähiger Verein aktive Prozessführungsbefugnis hat. Im Jahre 2014 hat der Oberste Gerichtshof zum erstmalig anerkannt, dass der nicht rechtsfähige Verein Prozessführungsbefugnis über das Grundstück hat, dessen Eigentum seinen Mitgliedern materiellrechtlich gemeinsam zusteht, und dass sich die Rechtskraft eines Urteils gegen den Verein auf dessen Mitglieder erstreckt. Allerdings geht aus dem Urteil nicht klar hervor, warum der Verein Prozessführungsbefugnis hat und warum die Rechtskraft sich auf die Mitglieder erstreckt. Diese offenen Fragen lassen sich durch den bisherigen wissenschaftlichen Meinungsstand schwer erklären. Der Zweck dieses Aufsatzes ist es, die Grundlage der Prozessführungsbefugnis des Vereins und der Erstreckung des Urteils gegen den Verein deutlich zu machen.

Zunächst bejahe ich die Prozessführungsbefugnis des Vereins, weil er das betreffende Grundstück selbstständig verwenden kann, obwohl dieses den Mitgliedern gehört. Weiterhin begrüße ich die Erstreckung des Urteils gegen den Verein auf dessen Mitglieder, weil sich der Verein organisationsrechtlich auf die Mitglieder bezieht.

Freedom of Broadcasting in Italy

Satoshi HATAE

This article deals with the freedom of broadcasting in Italy. This freedom has achieved characteristic development. First, the broadcasting monopoly was held unconstitutional by the constitutional court, secondly, commercial broadcasting was introduced without any efficient legal regulations, thirdly, the monopolization of commercial broadcasting made dramatic progress, and the privatization of public broadcasting was legally prescribed. The author considered how broadcasting related to society, state, and market in each period, and concluded that the freedom of broadcasting in Italy valued not the relationship of broadcasting to state and market but the relationship of broadcasting to society. In order that broadcasting may play an important social role, it is supposed to be necessary that the constitutional court establish an appropriate equilibrium of state and market. This conception is a characteristic of the freedom of broadcasting in Italy, which cannot be found in the freedom of broadcasting in Germany and France.